FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 405

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
CARL S. LLOYD,
120 E. Randolph Drive,
Chicago, Illinois,
Attorneys for American National Bank and Trust Company of Chicago, as Former Trustee under Its Trust No. 4954.

WILLIAM H. DILLON,
JOHN O. SNOOK,
111 W. Washington Street,
Chicago, Illinois,
Attorneys for Chicago Title and Trust Company.

DAVID LEVINSON,
EDWIN A. ROTHSCHILD,
77 W. Washington Street,
Chicago, Illinois,
Attorneys for The Northern Trust Company, as Successor Trustee under Will of Mayer Taussig, Deceased.

HORACE A. YOUNG,
135 S. LaSalle Street,
Chicago, Illinois,
Attorney for Ruth Sarelon, Plaintiff in Civil Action No. 35 C 2271.

SUBJECT INDEX.

	PAGE
Opinions of Court Below and Related Decision	2
The Questions Presented for Review	3
Statement of the Case	3
Summary of Proceedings	3
Jurisdictional Facts	4
Petitioner's Adversaries	6
Argument	8
I. The June 4, 1947 and Subsequent Unappealed Decrees Were Not Void and Are Res Judicata	8
II. All Issues Were Determined in Adversary Proceedings	9
III. There Is No Conflict Between the Decision of the Court of Appeals and Any Decision of This Court	10
IV. There Is No Conflict Between Courts of Appeals	11
V. The Questions of Law Here Involved Are Peculiar to the Facts of this Case and Are of No General Importance	12
VI. The Decision of the Court of Appeals Is Based on Several Alternative Valid Grounds	13
Conclusion	15

Citations.

Cases.

Baldwin v. Iowa State Traveling Men's Association, 285 U. S. 522 9

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 9

Dowell v. Applegate, 152 U. S. 327 9

Evers v. Watson, 156 U. S. 527 9

Fidelity Casualty Co. of N. Y. v. Federal Express, 2 Cir., 136 F. 2d 35 10

Jackson v. Irving Trust Co., et al., 311 U. S. 494 9

Stoll v. Gottlieb, 305 U. S. 165 9

Taussig v. Chicago Title and Trust Company, 171 F. 2d 553 2

Ex Parte Joseph M. Taussig, Petitioner, No. 9586 (Tr. 333-337; cert. den. 355 U. S. 829) 2

Treines v. Sunshine Mining Co., 308 U. S. 66 9

Statutes and Rules:

Rule 60 (b) (4) of Federal Rules of Civil Procedure, 28 U. S. C. A. 3, 4, 6, 14

Sec. 2283, 28 U. S. C. A. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 405.

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

This brief is respectfully submitted not only on behalf of the named Respondent, American National Bank and Trust Company of Chicago (herein called "American National"), but also on behalf of Chicago Title & Trust Company (herein called the "Title Company"), the Northern Trust Company (herein called the "Successor Trustee") and Ruth Saxelby, the original plaintiff in the proceedings below. Although American National is the only Respondent named by Petitioner, the other parties joining in the brief were nevertheless also his adversaries in the District Court and Appellees in the Court of Appeals.

Petitioner's statement of the proceedings and issues and his statement of the case are incomplete and inaccurate and therefore restatement is deemed necessary.

OPINION OF COURT BELOW AND RELATED DECISIONS

It is desired to call the Court's attention at the outset to the fact that in addition to the opinion of the Court of Appeals for the Seventh Circuit reported in 255 F. 2d 765 (which is printed as an Appendix to the Petition but without corrections made by the Court and should therefore be read from the official report), there are certain other opinions and orders which have been rendered in the course of this protracted litigation (begun in 1945) which are pertinent to the issues here presented.

In the October, 1947 Term of the Court of Appeals, Petitioner, on the same alleged jurisdictional grounds as are here asserted, petitioned that Court for a writ of mandamus directing the District Court to vacate and expunge as "void" all its decrees and orders in the case (C. A. No. 45 C 2271). The petition was denied by the Court of Appeals in an unreported opinion (*Ex Parte Taussig*, No. 9586, Tr. 333-337*) and certiorari was denied by this Court ten years ago (*Taussig* v. *Barnes*, Docket No. 78, October Term, 1948, 335 U. S. 829).

In 1946 Petitioner filed third party proceedings against the Title Company in said Cause No. 45 C 2271 on a title policy on the "Drexel property" mentioned in the petition, thus invoking the jurisdiction of the Court. The District Court rendered judgment for the Title Company (Supp. App. 9-18) which was affirmed by the Court of Appeals (*Taussig* v. *Chicago Title*, 171 F. 2d 553).

* We adopt the record designations used by Petitioner, namely, "Tr." for the transcript taken from *Ex Parte Taussig*, C. A. 7, No. 9586; "App." for Appellant's Appendix and "Supp. App." for Appellees' supplemental appendix in Nos. 12137-8. However, in that part of the transcript taken from No. 9586 where new page numbers have been stamped over the original printed page numbers to give numerical sequence to all the pages of the transcript, references in this brief are to the *stamped* page numbers.

It thus appears that this is not the first time the Court of Appeals and this Court have had occasion to consider the question of jurisdiction which Petitioner now again seeks to present.

THE QUESTIONS PRESENTED FOR REVIEW.

The true questions here presented for review are those set forth by the Court of Appeals (Pet. for Cert., p. 20), namely: Whether an issue determined and confirmed by seven unappealed final decrees is *res judicata*; whether estoppel can be invoked against a party who induced the actions of which he complains and who obtained direct benefits from the decrees which he attacks; whether a federal court can protect its decrees by appropriate injunction against one who disobeys them; and whether the District Court correctly denied Petitioner's unconscionably belated motion under Rule 60(b), FRCP, to vacate a series of unappealed decrees which have been fully and irrevocably complied with by all parties except the movant.

Underlying all these questions is a more basic one: Whether an issue adjudicated and re-adjudicated by federal courts of competent jurisdiction can be relitigated forever.

STATEMENT OF THE CASE.

Summary of Proceedings.

On June 4, 1947, at the suit of Ruth Saxelby, Petitioner's sister, the District Court entered a final decree in said Cause No. 45-C-2271 deposing Petitioner as a trustee under their father's will and directing the restoration of trust real estate—an apartment building known as "the Drexel property"—which the Court held Petitioner had secretly acquired for his own benefit (Tr. 179, 180, 204-209). Petitioner had placed title to the Drexel property in American

National as trustee under a land trust of which Petitioner was sole beneficiary (Tr. 171-180). The decree of June 4, 1947 ordered American National to convey such property to the Successor Trustee and ordered Petitioner to execute a direction for such conveyance (Tr. 206-7). American National made the conveyance; Petitioner failed to execute the direction (App. 96, 163). Petitioner did not appeal from this decree (Tr. 294).

The District Court, between 1947 and 1952, entered six subsequent final orders and decrees, three of them with the express consent of Petitioner, under which the Successor Trustee distributed the trust property (App. 57-60, 81-108, 109-123, 133-141; Supp. App. 62-66, 67-71, 87-101). Petitioner, as a beneficiary under his father's will, shared in the benefits of this distribution, *including his share of the proceeds of the sale of the Drexel property* (App. 113-114; Supp. App. 37-41, 74-75, 81-86, 93-101). None of these subsequent orders or decrees was appealed.

On June 6, 1957, ten years after the entry of the 1947 decree, Petitioner filed a suit in a state court against American National asking damages in the amount of $500,000 because of its conveyance of the Drexel property to the Successor Trustee in compliance with the decree of the District Court of June 4, 1947. Petitioner thereafter, on June 26, 1947, filed a motion under Rule 60 (b) (4) to vacate and expunge the final decree of June 4, 1957 and all subsequent proceedings and decrees (App. 142-147). On the same day, namely, June 26, 1957, American National petitioned the Court for an order enjoining the prosecution of Petitioner's state court suit and ordering Petitioner to execute the direction required by the 1947 decree (App. 150-154, 191-193).

The District Court first heard Petitioner's motion (172-182) made under Rule 60 (b) (4), which by admission of Petitioner's counsel "* * * would of course necessarily

determine the affirmative relief which is being presented to the court by American National Bank * * *" (App. 174), and denied the motion. The Court then granted American National's petition for injunction on the ground that Petitioner's State court action was founded on his disobedience of the Federal Court's order (App. 184, 191). In this connection the Court found the petition allowable on the facts already litigated and determined in the case, saying (App. 183): "I don't think I should go over ground I went over ten years ago, and I don't see why the parties should be required to go over ground they went over ten years ago."

Jurisdictional Facts.

In the original complaint filed by Ruth Saxelby on December 20, 1945 (Tr. 42-61), federal jurisdiction was based upon diversity of citizenship (Tr. 43). The complaint alleged that plaintiff was a citizen of New York and that the citizenship of defendants was as follows: Petitioner, Illinois; Irving H. Robitshek (co-trustee with Petitioner, also removed by the 1947 decree), Minnesota; Leo Taussig (a life beneficiary), Wisconsin; Rose Goodman (a residuary beneficiary), Wisconsin; Ella Robitshek (a residuary beneficiary), Minnesota; American National, Illinois (Tr. 42-43). Petitioner's answer admitted these allegations (Tr. 99).*

Petitioner's attack upon the jurisdiction of the District Court arises, not from any "jurisdictional defect" on "the face of the record" as alleged in the petition, p. 10, but from the Court's refusal after trial to realign as a plaintiff

* Petitioner had also sought from time to time to defeat jurisdiction by moving to realign as plaintiffs the defendant wife of defendant Irving H. Robitshek (who had sided with her husband and Petitioner in resisting the plaintiff) and a non-party, Fannie Daus (who had died before trial without acquiring any interest in the estate). (Tr. 79-84, 147-151, 190-3; App. 22-29, 109-123.) None of these motions was allowed. (Tr. 203, 334.) Petitioner has apparently abandoned these jurisdictional attacks—at least his petition seems to center only upon Leo. (Pet. for cert. pp. 9-10.)

a deceased party defendant whose life interest had terminated. Leo Taussig, a defendant, had originally been assumed by all parties, including Petitioner, to have been a citizen of Wisconsin (Tr. 43, 99). Leo died before the trial. After the case had been tried and the Court had decided it against Petitioner, and after Leo's death had been noted of record, Petitioner asserted that Leo had really been an Illinois citizen (having been moved to an institution in Wisconsin as an incompetent). Petitioner then moved for the first time to have Leo, who was then dead, realigned as a plaintiff and to dismiss the suit because of Leo's common citizenship with Petitioner (Tr. 190-3; App. 22-29). The Court entered a supplementary finding that Leo had been an Illinois citizen, dismissed him as a party defendant, and declined to realign the parties (Tr. 199-200; App. 29). Denying Petitioner's motion and reaffirming its jurisdiction, the Court entered its unappealed final decree of June 4, 1947 (Tr. 199-201, 203).

Petitioner's Adversaries.

Petitioner names only American National as a Respondent and states: "Petitioner asserted no claim against the parties to whom he occupied an adversary position in the original proceeding of *Saxelby* v. *Taussig*" (Pet. for cert. p. 15).

This statement is hard to reconcile with Petitioner's request that this Court review the denial of his motion under Rule 60(b), by which Petitioner sought to wipe out the entire proceeding and to destroy the adjudicated rights of Ruth Saxelby (the original plaintiff and Petitioner's original adversary, in whose favor the June 4, 1947 decree was entered after an 18-month contest) and of the Successor Trustee (who was appointed to replace Petitioner under the 1947 decree and who thereafter administered the

trust estate under the orders and decrees attacked by Petitioner herein).

Although Petitioner has not seen fit to name these parties as Respondents, they, as well as the Title Company and American National, are his adversaries here, as they were below.

ARGUMENT.

I.

THE JUNE 4, 1947 AND SUBSEQUENT UNAPPEALED DECREES WERE NOT VOID AND ARE RES JUDICATA.

An examination of the record (Tr. 167-186; Tr. 199-201; App. 11, 12, 16, 19; Tr. 159; App. 29) will show that the plaintiffs (Ruth Saxelby's children were added as plaintiff's after the complaint was filed) were at all times residents of New York and the defendants were all citizens of states other than New York. The residence of Leo Taussig was immaterial so long as he was not found to be a citizen of New York. Neither the Petitioner nor anyone else suggested that he should be realigned or that he was not a citizen of Wisconsin, as had been admitted by Petitioner in his answer, until after he was dead and his interest terminated, and after the case had been tried and decided against the Petitioner. When he was dismissed from the case after his death he was dismissed as a defendant.

While it is true that the Petitioner at that late stage argued for a realignment, the District Court found it unnecessary to realign the parties, found that it had jurisdiction and entered the final decrees heretofore enumerated, from which Petitioner did not appeal.

The unalterable fact is, as found by the Court of Appeals in the subsequent mandamus proceeding instituted by Petitioner in 1948, that "for reasons best known to * * * Petitioner, * * * a well-trained lawyer of great ability and considerable experience (petitioner), saw fit not to avail himself of his right to appeal, waiving that right by agreement and by failure to exercise it within the time limited by

statute for perfecting an appeal. Thus, it was his own action or inaction, not that of the Court, which deprived him of Appellate review of the judgment now sought to be vacated and expunged * * *" (Tr. 337).

The following decisions of this Court, which are cited in the opinion of the Court of Appeals, firmly establish the principle of law that the final orders of a federal court entered in a proceeding where the issue of jurisdiction has been raised in an actual controversy between parties who have been brought before the court in accordance with the requirements of due process, and from which no timely appeals have been taken, are not void and cannot be set aside and expunged on a belated motion to vacate:

Jackson v. Irving Trust Co. et al., 311 U. S. 494, 503; affirming *Sorenson, et al. v. Sutherland, et al.*, 109 F. 2d 714, 718, 719.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 376.

Stoll v. Gottlieb, 305 U. S. 165, 171, 172, 174, 176.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 78.

Ewers v. Watson, 156 U. S. 527, 533.

Dowell v. Applegate, 152 U. S. 327, 337, 340.

Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522, 527.

II.

ALL ISSUES WERE DETERMINED IN ADVERSARY PROCEEDINGS.

There is no question here of unlitigated rights as between nonadversary co-defendants, as Petitioner would have the Court believe. Petitioner's original adversaries are still in the case; the device of not naming them as Respondents cannot make them disappear. Every issue

was litigated and adjudicated. Expressly adjudicated were American National's obligation to convey to the Successor Trustee the Drexel property which Petitioner had secretly placed in its name and Petitioner's obligation to execute a direction authorizing such conveyance. In fact the very essence of Ruth Saxelby's suit was to have this Drexel property restored to the trust and that was the primary subject of the litigation.

It is immaterial that Petitioner and American National were originally co-defendants. As held in the case of *Fidelity Casualty Co. of N. Y.* v. *Federal Express*, 2 Cir., 136 F. 2d 35, 39:

> "Insofar as the rights or obligations of co-parties inter se are dependent on their rights or obligations toward their common adversary, the judgment adjudicating the latter is conclusive upon co-defendants in subsequent litigation between them."

III.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ANY DECISION OF THIS COURT.

Neither *Mitchell* v. *Maurer*, 293 U. S. 237, *Gilbert* v. *Davis*, 235 U. S. 561, nor *Indianapolis* v. *Chase National Bank*, 344 U. S. 63, holds that objections to diversity jurisdiction are open to perpetual re-examination even after they have been finally adjudicated by unappealed final decrees. In none of these cases was the issue of *res judicata* involved; furthermore, jurisdiction was considered on direct review, not, as here, by a belated motion to vacate. *United States* v. *United States Fidelity & G. Co.*, 309 U. S. 506 did not involve diversity jurisdiction but rather the power of the court to enter judgment against the sovereign without its consent. It in no way affects the force or effect of any

of the numerous decisions of this Court cited by the Court of Appeals.

These are the only Supreme Court cases relied on by Petitioner and obviously there is no conflict with any of them.

IV.

THERE IS NO CONFLICT BETWEEN COURTS OF APPEALS.

On pages 10 and 11 of the petition, effort is made to show that "the decisions of the Courts below are in conflict with the decisions of other Courts of Appeals". That is not true, as a brief review of the cases cited will show.

Dobbins v. *Barnes*, 9 Cir., 204 F. 2d 546, simply held that a decision of the Tax Court upon a tax due to the United States did not adjudicate rights as between a taxpayer-trustee and a beneficiary of the trust; as the Court of Appeals stated, the Tax Court had no jurisdiction to resolve any issue between trustee and beneficiary. However, the case did hold that a prior state court judgment approving the trustee's accounting was *res judicata* between the trustee and the beneficiary who, as here, had accepted distribution. To the extent that *Dobbins* is pertinent, it supports the decision below.

City Bank of Wheeling v. *Rhodehamel*, 4 Cir., 223 F. 979, is not remotely in point; *Ohio Casualty Company* v. *Gordon*, 10 Cir., 95 F. 2d 605, upheld a plea of *res judicata* as between record co-defendants.

State of Missouri v. *Title Guaranty and Surety Co.*, 8 Cir., 72 F. 2d 595, and *Mitchell* v. *Village Creek Drainage District*, 8 Cir., 158 F. 2d 475, involved questions of state, not federal, jurisdiction. The first case simply held that a Missouri Probate Court order was a nullity under Missouri law. The second held that prior Arkansas judgments were valid under Arkansas law and thus *res judicata*

in the federal court. The latter opinion concludes with this apposite statement:

> "* * * [I]f this were not true, litigation would not end until the parties had no more money [and until] the ingenuity of counsel in suggesting additional grounds in support of the issue had been exhausted." (158 F. 2d, at 478).

Hicklin v. *Edwards*, 8 Cir., 226 F. 2d 410, cited on page 15 of the petition, and *United States* v. *Sotis*, 7 Cir., 131 F. 2d 783, cited in the text book quotation on page 14, involved default judgments entered without personal jurisdiction. Here the District Court had personal jurisdiction over all parties, including Petitioner.

It is thus evident that there is no conflict whatever between Circuits.

V.

THE QUESTIONS OF LAW HERE INVOLVED ARE PECULIAR TO THE FACTS OF THIS CASE AND ARE OF NO GENERAL IMPORTANCE.

We think it is evident that the issues of this case are concerned only with a very special state of facts and are of significance only to the parties to the controversy. The question of whether the District Court committed error in 1947 by dismissing a deceased party defendant, whose interest in the trust involved had terminated, and denying a belated motion for realignment made by Petitioner in a desperate effort to evade a decision which had gone against him, is certainly not a proper one for review by this Court on writ of certiorari. Even if the Trial Court had been in error, which it was not, its decision could only have been reviewed on a timely appeal.

VI.

THE DECISION OF THE COURT OF APPEALS IS BASED ON SEVERAL ALTERNATIVE VALID GROUNDS.

While the *res judicata* ground of the decision is in itself sufficient and controlling, the Court also gave other equally valid grounds for its conclusion, and for this further reason the decision is unassailable.

As shown by the decision (App. to Pet. for cert. 22-23), Petitioner is clearly estopped to attack the unappealed and consent decrees in this case. The fact that he accepted his distributive share of the Drexel property (the principal subject matter of the suit) in itself constitutes a complete estoppel. As the Court said, "One who accepts the benefits of a judgment, decree or judicial order is estopped to deny the validity thereof." Furthermore, his motion to vacate in the Court below and his present petition are directly in violation of a settlement decree entered on his stipulation in 1948 (referred to by the Court of Appeals, Pet. for cert., p. 20) in which he expressly "waived any and all right of appeal * * * directly or indirectly" and agreed that "the Successor Trustee and all the parties hereto shall be entitled to rely upon the provisions of this decree and to carry out such provisions forthwith and to change position in reliance thereon * * *" (App. 106).

Petitioner, aware of the validity and devastating effect of this independent ground of the decision, sought to escape it by the thinly-veiled device of omitting Ruth Saxelby and the Successor Trustee as named respondents in his petition. But of course their rights are directly affected and the rights of all of Petitioner's adversaries, including American National, are so inextricably bound together that no valid distinction can be drawn between them.

The Court of Appeals also solidly based its decision on the ground that the "reasonable time" prerequisite of Rule 60 (b) (4) was applicable and had not been met by Petitioner (App. to Pet. for cert. p. 23).

A complete answer to Petitioner's assertion (Pet. for cert. p. 12) that the granting by the District Court of the injunction on American National's petition "offended the prohibition of 28 U. S. Code § 2283" is contained in the next to the last paragraph of the opinion (App. to Pet. for cert. p. 24), where it is clearly shown that such action was within the expressly granted power of a United States Court to enjoin parties from proceeding in a State court where necessary to "protect or effectuate its judgments."

CONCLUSION.

We respectfully submit that the petition for certiorari is wholly without merit and should be denied.

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
CARL S. LLOYD,
130 E. Randolph Drive,
Chicago, Illinois,
Attorneys for American National Bank and Trust Company of Chicago, as Former Trustee under its Trust No. 4954.

WILLIAM H. DILLON,
JOHN O. SNOCK,
111 W. Washington Street,
Chicago, Illinois,
Attorneys for Chicago Title and Trust Company.

DAVID LEVINSON,
EDWIN A. ROTHSCHILD,
77 W. Washington Street,
Chicago, Illinois,
Attorneys for The Northern Trust Company, as Successor Trustee under Will of Maurice Taussig, Deceased.

HORACE A. YOUNG,
135 S. La Salle St.,
Chicago, Illinois,
Attorney for Ruth Savelby, Plaintiff in Civil Action No. 45-C-2271.